LYE MUN FOH v. ONG CHEOW ENG

[A.C.J. (Mohamed Dzaiddin J.) September 30 & November 9, 1987]

[Penang – Civil Appeal No. 96 of 1984]

Civil Procedure – Summons and statement of claim – Striking off – Application for – Whether dispute should be arbitrated first – Different types of disputes – Nature of defamation as a cause of action – National Union of the Teaching Profession Peninsular Malaysia Rules, r. 27 – Trade Unions Ordinance 1959, s. 44.

The defendant applied under Order 14 rule 21(1) of the Subordinate Courts Rules 1980 to strike out the plaintiff's summons and the statement of claim as being frivolous, vexatious and an abuse of the process of court. The learned President granted the application. The plaintiff appealed.

In his judgment, the learned President had concluded that the action commenced by the plaintiff against the defendant was premature as the plaintiff's claim comes within a dispute between a member and an officer of a trade union and ought to be adjudicated in the manner provided for by section 44 of the Trade Unions Ordinance 1959 and rule 27 of the Rules of the National Union of the Teaching Profession Peninsular Malaysia.

Held, allowing the appeal: (1) although the learned President was correct in stating that rule 27 did not apply to all disputes between members of the Union, he ran foul in failing to distinguish the classes of disputes under rule 27 and the plaintiff's cause of action, *i.e.* defamation;

(2) there must be a clear distinction between "disputes" as envisaged in rule 27 and defamatory action affecting personal character of the plaintiff. In matters involving a reputation of a person, it ought to be excluded from the classes of disputes under rule 27;

(3) the plaintiff should be allowed to proceed with his claim in the action without waiting for the matter to be decided by reference to arbitration;

(4) the learned President had erred in the exercise of his discretion in striking out the plaintiff's summons and the statement of claim. It was indeed wrong for the learned President to have come to the finding that the plaintiff's action was so obviously unsustainable in law that to put it forward would be an abuse of the process of the court;

(5) the action should be reinstated.

Cases referred to:

(1) *Radford* v. *Hair & Ors.* [1971] Ch. 758.
(2) *Turner* v. *Fenton And Others* [1982] 1 W.L.R. 52.
(3) *Williams & Humbert* v. *W. & H. Trade Marks* [1986] A.C. 368, 411.
(4) *A.G. of Duchy of Lancaster* v. *L. & N.W. Ry.* [1892] 3 Ch. 274 at p. 277.

CIVIL APPEAL.

R. Manecksha for the appellant.
V. Shanmugam for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This is an appeal by the plaintiff against the decision of the learned President, Sessions Court Pulau Pinang in Summons No. S(C) 845 of 1983 given on August 17, 1984 striking out the plaintiff's summons and the statement of claim on an application dated June 9, 1984 made by the defendant under Order 14 rule 21(1) of the Subordinate Courts Rules 1980, as being frivolous and vexatious, and otherwise an abuse of the process of the court.

The defendant's grounds in asking the court to strike out the plaintiff's summons and the statement of claim are as follows:

(1) The action commenced by the plaintiff constitutes a dispute between the defendant and the plaintiff as a member and officer of a branch of a trade union and as such should be first referred to arbitration.

(2) The said dispute is statutorily required under section 44 of the Trade Unions Ordinance 1959 to be decided in the manner directed by the rules of the relevant trade union and the decision so given on arbitration is binding and conclusive on the disputing parties.

The learned President after hearing the submission of counsel found that the plaintiff's action was "so obviously unsustainable in law that to put it forward would be an abuse of the process of the court". In conclusion, he stated that the defendant must therefore succeed in his application and dismissed the plaintiff's action with costs. From his grounds of decision, it is clear to me that the learned President had concluded that the action commenced by the plaintiff against the defendant was premature as the plaintiff's claim comes within a dispute between a member and an officer of a trade union and ought to be adjudicated in the manner provided for by section 44 of the Trade Unions Ordinance 1959 and rule 27 of the Rules of the National Union of the Teaching Profession Peninsular Malaysia. The learned President agreed with the submission of counsel for the defendant that until a dispute is resolved under the Ordinance, the court has no jurisdiction to hear the civil action. In addition, he held that the dispute between parties came within the terms contemplated by the Ordinance and the rules.

The plaintiff's claim in the civil action is essentially for damages arising from certain defamatory statements published by the defendants to the officials of the National Union of the Teaching

Profession. The alleged defamation was published in three letters which the defendant sent to the honorary secretary of the said union with copies to the management committee and officials of the national body. It is not disputed that both the plaintiff and the defendant were teachers and members of the said union, the former being the chairman of the Penang branch at the material time.

There are two main grounds of appeal. The first ground is that the learned President was wrong in his finding that the plaintiff's cause of action for defamation ought to have been referred to arbitration under rule 27 of the Rules of the National Union of the Teaching Profession. Secondly, the learned President erred in allowing the defendant's application as there was considerable delay on the part of the defendant to make the said application and that it did not specify on what grounds the application for a dismissal of the action was made.

For the purpose of this appeal, it is worth setting out the relevant parts of section 44(1)(a) of the Trade Union Ordinance and rule 27 of the Rules of the National Union of the Teaching Profession Peninsular Malaysia. Section 44(1)(a) of the Ordinance states as follows:

"Every dispute between a member ... and the union or ... an officer thereof ... shall be decided in the manner directed by the rules of the trade union and the decision so given shall be binding and conclusive on all parties..."

and rule 27 of the Union Rules reads:

"1. Every dispute between –

(a) a member ... on the one part, and the Union ... or an officer thereof on the other part, or

(b) ...

(c) ...

(d) ...

shall be decided by reference to arbitration.

..."

On the first ground, which I consider being the crucial issue, the learned President held that an action for defamation does come within a "dispute" between members on one part and the union or an officer thereof on the other. In his grounds of decision, he concluded that: "And this, from the pleadings, is obviously such a case. It is also equally obvious that the action arose from the conduct of both parties in their capacities as member and officer of their union." In my opinion, the learned President was correct in stating that the provision, which I take it to mean rule 27 of the Union Rules, does not apply to all disputes between members of the Union. However, he ran foul in failing to distinguish the classes of disputes under rule 27 and the plaintiff's cause of action, *i.e.* defamation. His reason was simply that the action arose from the conduct of the parties in their capacities as member and officer of the Union. In my judgment, there must be a clear distinction between the "disputes" envisaged in rule 27 and a defamatory action affecting the personal character of the plaintiff. I concede that both parties are members of the same union, but in my opinion in matters involving a reputation of a person, it ought to be excluded from the classes of disputes under rule 27. As an authority, I rely on *Radford* v. *Hair and Others*[1] applied in *Turner* v. *Fenton And Others*[2], both being decisions of a court of first instance. In *Radford* v. *Hair and Others,*[1] the plaintiff entered into a partnership in May 1968 to carry on business with the defendants under a deed of partnership whereby he covenanted, *inter alia,* "to be just and faithful to the others." By an arbitration clause, the partners agreed to refer to arbitration all disputes arising during or after the determination of the partnership in relation, *inter alia,* to any act or omission of any partner or any other matter touching the partnership affairs. In October 1969, the partnership was dissolved. The plaintiff left the partnership, which was carried on by the defendants. In working out the rights under the dissolution, the defendants made charges against the plaintiff, alleging, *inter alia,* (1) that he had represented that he had been engaged on behalf of clients one of whom was merely a private company in which he had an interest, (2) that he made a false statement as to the anticipated profit of the branch of the firm for which he was responsible and (3) that he made a false statement concerning a certain arrangement with E. and S.P. Ltd. In August 1970, the plaintiff brought an action against the defendants claiming, *inter alia,* an inquiry as to the value of the goodwill of the partnership business computed in accordance with the terms of the deed.

On an application by summons by the defendants for an order to stay proceedings in the action pursuant to section 4 of the Arbitration Act 1950, it was held that since the plaintiff was required to meet allegations of actual dishonesty involving his professional reputation, he was entitled to have the

case tried by a judge in open court and accordingly the application would be dismissed.

In *Turner*[2] the plaintiff, who was a partner in a firm of solicitors, sought by a writ against his former partners accounts of moneys alleged to be due to him from the partnership. By a summons, the defendants asked that the action should be stayed pursuant to section 4 of the Arbitration Act 1950 on the ground that by a partnership deed it had been agreed to refer to arbitration the matters in respect of which the action was brought. The affidavit sworn in support of the summons made certain allegations against the plaintiff which were contained in a letter. This letter contained express allegations of improper professional conduct and negligence and implicit allegations of dishonesty and breach of contract.

On hearing of the summons, Warner J. held that where allegations of incompetence, negligence and impropriety were made so that a man's professional reputation was at stake, he ought to have the benefit of a trial in the High Court, even though no allegations of actual fraud or dishonesty were involved. At p. 64, the learned judge stated thus:

"It seems to me that, in a case like the present, allegations of incompetence, negligence, impropriety and dishonesty, can shade into one another. I agree, of course, with Mr. Thomas's submission that there is no rule that an allegation of negligence against a professional man precludes arbitration. There is, however, a clear indication in *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130 that, where a professional man's reputation is at stake, he ought to have the benefit of a trial in the High Court. It is, at the end of the day, a matter of discretion, and I have come to the conclusion that in this case the plaintiff ought to be allowed to proceed with his action in this court."

It is clearly seen from the above cases that the allegations giving rise to the plaintiff's claim in the action are based on a person's reputation, *i.e.* dishonesty, incompetence and impropriety. What more in the present appeal where the alleged defamatory statements also affect the reputation of the plaintiff. Hence, he should be allowed to proceed with his claim in the action without waiting for the matter to be decided by reference to arbitration. For these reasons, the learned President has erred in the exercise of his discretion in striking out the plaintiff's summons and the statement of claim.

On the plaintiff's second ground of appeal, I wish to make one observation. Looking at the defendant's notice of application (p. 23), one would have expected the learned President to make an order for a stay of the plaintiff's action pending the reference to arbitration under rule 27. Instead, after hearing the application on August 17, 1984, he ordered that "the plaintiff's summons and the statement of claim be dismissed with costs." Clearly, the judgment was wrong because there was no trial of the plaintiff's claim but only an application of the defendant striking out the summons and the statement of claim.

On the question of Order 14 rule 21(1) (which is *in para materia* with Order 18 rule 19(1) of the Rules of the High Court 1980), it must be borne in mind that the power to strike out is discretionary and that the power only arises if the pleadings disclose no reasonable cause of action or defence (*Williams & Humbert* v. *W. & H. Trade Marks*[3]).

Therefore, having considered the matter as a whole, I do not think, and indeed, it is wrong for the learned President to have come to his finding that the plaintiff's action was "so obviously unsustainable in law that to put it forward would be an abuse of the process of the court." With respect, he was influenced more by these words of Lindley L.J. in *A.G. of Duchy of Lancaster* v. *L. & N.W. Ry.*[4] that he failed to consider the effect of Order 14 rule 21(1) of the Subordinate Courts Rules to the plaintiff's cause of action. The question is: Is the plaintiff's action obviously frivolous and vexatious or an abuse of the process of the court? Upon the facts and the law, I do not think so.

In the circumstances, I allow this appeal with costs and make an order for a reinstatement of this action to be tried in the Sessions Court.

Solicitors: *Lim Kean Siew & Co.; Shanmugam & Co.*